Ronin Shipbuilding, Inc. *and* Union De Trabajadores Industriales De Puerto Rico. Case 24–CA–7717

January 7, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On April 14, 1998, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Elias Martinez on June 2, 1997. The judge found that the evidence supporting the General Counsel's case was "thin" and that Martinez in fact had a chronic attendance problem, the asserted reason for his discharge. The judge nevertheless found that the Respondent used this long-tolerated problem as a pretext for retaliating against a prounion employee 3 weeks after a Board representation election that the Union lost by a single vote. Contrary to the judge, we find that the General Counsel failed to prove an 8(a)(3) violation by a preponderance of the evidence.

Martinez had been a carpenter for the Respondent since May 1995. It is undisputed that he had a long-standing record of absenteeism and tardiness. He received one written warning for this record on October 5, 1995, but the problem continued unabated. In 1996, he was tardy or absent approximately 100 times.[2] From January 11, 1997,[3] when the Respondent reopened following its Christmas break, through June 1, Martinez had 16 more absences and 18 more tardy arrivals.

The Union began its organizational campaign among the Respondent's employees in March 1997. During the campaign, Martinez signed a union authorization card and was one of the dozen or so employees who attended union meetings, including meetings at a bus stop visible from the Respondent's premises. The Respondent's officials were aware of which employees, including Martinez, supported the Union.

The Union petitioned for a Board representation election on March 27. Thereafter, the Respondent's President Carlos Soto campaigned against the Union. The judge found no credible evidence that Soto committed any unfair labor practices during the campaign. The vote in the ensuing May 8 election was 12 for and 13 against the Union. The Union filed a single objection to the election, which the Board subsequently overruled.

Martinez was tardy or absent nine times during the critical period between the filing of the election petition and the election itself. After the election, he was tardy on May 13, 20, and 21, and absent on May 23, 27, and 28. On June 1, Soto decided to discharge Martinez. On June 2, Soto gave Martinez a letter stating that he was terminated because of his latenesses and absences.

In deciding that the General Counsel had proved discriminatory motivation for Martinez' discharge under the *Wright Line* test,[4] the judge correctly noted the well-settled principle that proof of animus and discriminatory motivation may be inferred from circumstantial evidence.[5] Applying these principles, the judge inferred animus and discriminatory motivation from the close proximity in time between Martinez' union activities and his discharge, and from what the judge found to be the pretextual nature of the Respondent's explanation of the discharge. We do not agree that the facts in this case justify the inferences drawn by the judge.

Initially, we note that Martinez' participation in the Union's campaign was limited an unexceptional, that there is no evidence he was commented upon or singled out in any way for his union activities, and that, apart from his discharge, the judge found no unlawful statements or actions by the Respondent manifesting union animus. The unlawful discharge finding thus necessarily rests entirely on the facts that Martinez was known to support the Union, that he was discharged 3 weeks after the Union lost the election, while a single election objection was pending, and that the conduct that the Respondent asserted was the ground for his discharge was his persistence in behavior—his tardiness and absences from work—that the Respondent had punished over the previous 2 years only with a written warning. The judge agreed that Martinez' attendance record was abysmal, but concluded that the Respondent had seized on it as a pretext in order to fire a union supporter.

Although we agree that the timing here is not insignificant, we cannot find on this record sufficient evidence to establish that it was more probable that Martinez was

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent treats arrivals after 7 a.m. as tardy, and any departure prior to the 4 p.m. quitting time as absence.

[3] All subsequent dates are in 1997.

[4] See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); see also *Manno Electric*, 321 NLRB 278, 280 fn.12 (1996).

[5] E.g., *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991), and cases cited therein.

fired because of his minimal union activities than that he was fired because the Respondent finally reached the end of a very long rope with regard to his unabating attendance problems. As noted above, from May 23 to 28, just before the June 1 decision to discharge him, Martinez had been absent for 3 out of 6 days (May 23, 27, and 28). While the case is close, we believe that the record of the Respondent's treatment of other employees with attendance problems precludes finding that what the judge admitted was a "thin" case made out by the General Counsel can carry the day. The record shows that the Respondent had no formal absenteeism and tardiness policy linking a certain number of infractions to a particular sanction. Although it tolerated a high degree of absenteeism and tardiness, it ultimately did discharge some employees for attendance problems that were the same as, or arguably less severe than, those of Martinez. Moreover, in some of these instances prior to the discharge of Martinez, the employee was discharged without any prior formal disciplinary action. Furthermore, there is no evidence that the Respondent had failed to discharge any employee with a sustained record of absences and tardy arrivals equal to or worse than Martinez'.

Based on the above, we find that the General Counsel has failed to make the requisite initial showing that antiunion sentiment was a motivating factor in the Respondent's decision to discharge Martinez. Even assuming that the General Counsel made such a showing, we find that the Respondent met its rebuttal burden of showing that it would have discharged Martinez in the absence of union activities. We shall therefore dismiss complaint in its entirety.

ORDER

The complaint is dismissed.

Ismael Rodriguez-Izquierdo, Esq., for the General Counsel.
Jorge P. Sala and Polonio J. Garcia, Esqs. (Jorge P. Sala Law Offices), of Ponce, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in San Juan, Puerto Rico, on February 2–3, 1998. The charge was filed June 13, 1997, and the complaint was issued on August 29, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, manufactures sport fishing boats at its facility in Ponce, Puerto Rico, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside of the Commonwealth of Puerto Rico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Union de Trabajadores Industriales de Puerto Rico, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The General Counsel alleges that Respondent violated Section 8(a)(1) and (3) in discharging employee Elias Martinez on June 2, 1997. He also alleges that Ronin violated Section 8(a)(1) in making several threats and in interrogating employees just prior to a representation election conducted at its facility on May 8, 1997.[1]

The discharge of Elias Martinez

Elias Martinez worked for Respondent as a carpenter from May 1995 until his termination for absenteeism and tardiness on June 2, 1997. During this period he was frequently absent from work and also late for work. On October 5, 1995, he received a "Notice of Error and/or Deficiency" from Respondent regarding his frequent absences from work. Respondent claims that it verbally warned Martinez about his continuing absences and tardiness in 1996 and 1997; he denies this. However, no formal disciplinary action was taken against him between October 5, 1995, and his termination on June 2, 1997. Between January 11, when Respondent resumed operations after Christmas vacation, and June 2, Martinez was absent from work on about 16 occasions and late 18 times.[2] His record of absences and tardiness in 1996 was worse than his record in 1997.

In February 1997, the Union began an organizing drive at Ronin's Ponce facility. Martinez signed an authorization card and attended several union organizational meetings, some of which were held at a bus stop across the street from Ronin's facility. This appears to be the extent of his union activity. Several of Respondent's supervisors, president, Carlos Soto and foremen, Amilcar Pagan, Carlos Velazquez, and Raul Rodriguez were aware that Martinez was prounion. Carlos Soto actively campaigned against the Union. However, as discussed below, I conclude that neither he nor any other supervisors or agents of Respondent violated the Act in doing so.

On May 8, the NLRB representation election was conducted at Respondent's plant. The Union lost the election 13–12. On May 15, the Union filed an objection to the conduct of the election. The sole basis for the objection was an allegation that Foreman Carlos Velazquez hovered near the polling place while employees were casting their ballots and engaged in electioneering. This objection was overruled by the Board, which certified the results of the election on August 5.

In order to prove that Respondent violated Section 8(a)(1) and (3) in terminating Elias Martinez, the General Counsel must show that union activity was a motivating factor in the Respondent's decision. Then the burden of persuasion shifts to Respondent to prove its affirmative defense that it would have taken the same action even if Martinez had not engaged in union or other protected activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981).

To establish discriminatory motivation, the General Counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility toward

[1] All dates are in 1997 unless otherwise indicated.

[2] Respondent considers departure from work before its 4 p.m. quitting time, as an absence and arrival at any time after 7 to be a tardy arrival.

that activity and a causally related adverse personnel action. Inferences of knowledge,[3] animus,[4] and discriminatory motivation[5] may be drawn from circumstantial evidence rather than from direct evidence.

I conclude that the General Counsel has established a prima facie case of discriminatory discharge. Martinez engaged in union activity and Respondent was aware of it. I infer animus and discriminatory motivation from the close proximity in time between Martinez' union activities and his discharge, and the pretextual nature of Respondent's explanation of the discharge.

On June 1, Ronin's president, Carlos Soto, decided to fire Elias Martinez on the next day. Respondent has offered no explanation for the timing of this decision. Martinez' time and attendance offered Respondent a reason for discipline or discharge at any time during his employment at Ronin. Ronin had tolerated his record over 2 years, with the exception of the October 1995 warning notice. Martinez' absenteeism and tardiness were not getting any worse. There had been no proximate warning notices or other instances of progressive discipline to which Martinez had been unresponsive.[6] There does not appear to be any reason for the sudden exhaustion of Respondent's patience apart from his union activity. This being so, I find that the reason proffered for the termination is pretextual.

The evidence supporting the General Counsel's case is thin. There are no credible statutory violations apart from Martinez' discharge nor other direct evidence of antiunion animus. However, given Ronin's prolonged tolerance for Martinez' absenteeism and tardiness, the absence of any explanation for the termination decision of June 1, and the timing of that decision in relation to Martinez' union activity and the election, I conclude Respondent bore animus toward him as a result of his support for the Union and that his termination was motivated by this animus. See *Debber Electric,* 313 NLRB 1094, 1101–1102 (1994), *Active Transportation,* 296 NLRB 431 (1989); *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466, 470 (9th Cir. 1962).

I reject Respondent's contention that the fact that Martinez was fired after, rather than before the election negates an inference of discriminatory motivation. The Union's objections to the election were pending at the time of Martinez' discharge. This provided Respondent with ample motivation to get rid of Martinez. Moreover, to have discharged Martinez prior to the election would have been very risky. Conceivably it could have resulted in a rerun election or even a *Gissel* bargaining order.

Further, I conclude that Ronin has not proved that it would have discharged Martinez apart from his union activity. Respondent does not have objective criteria as to how many absences or days tardy are grounds for discharge. It does not have any policy as to the frequency of absences or tardiness that warrants discharge. Ronin has established that in February 1996, it has discharged one employee, Jose Humberto Perez Garcia, for absenteeism and tardiness. Another employee discharged the same day as Garcia, Geraldo Torres Gonzalez, had recently been suspended for insubordination, in addition to being absent and tardy. His case therefore does not advance Respondent's argument that Martinez was discharged in accordance with a consistently applied company policy.[7]

The record indicates that sometimes Respondent tolerated absenteeism and tardiness and sometimes it did not. For example, in February 1996, when it discharged Garcia, Martinez' time and attendance record was arguably as bad or worse than Garcia's. Despite the fact that Martinez had received a warning notice several months before, Respondent took no action against him. The record does not disclose a nondiscriminatory factor by which Ronin decided that it was time to discharge an employee who was habitually late and tardy.

The General Counsel introduced timecards for a number of employees with significant time and attendance problems in 1997. Although, arguably none of these employee's records is as bad as Martinez', Ronin has not satisfactorily explained why it fired Martinez and not some of these other employees. Ronin's president, Carlos Soto, testified that the absences of the other employees were excused and Martinez' were not. However, I do not credit Soto's testimony in this regard.

Martinez notified his foreman whenever he was late or tardy. Soto claims that foremen had no authority to excuse an absence and that employees had to get permission from him. There is no evidence that Respondent ever told that to Martinez. Indeed, foreman Amilcar Pagan confirmed that Martinez regularly informed him that he would be absent. Pagan would so inform Soto. Pagan did not testify that he told Martinez that he must get prior approval for an absence from Soto. Moreover, Soto's testimony is belied by the fact that Martinez received no disciplinary action for what Soto alleges were frequently occurring unexcused absences.

Two of Martinez' 1997 absences, one on February 21, and another on May 7, occurred on days on which he worked a second job unloading ships at port of Ponce, from 7 p.m. to 7 a.m. Assuming, as Respondent claims, that Martinez lied to Respondent as to the reason for his absences on these dates, the lie is irrelevant to this case. Ronin did not apparently know of these misrepresentations when it fired Martinez and did not rely on them in its discharge letter to him. In summary, the only apparent explanation for the timing of Martinez' June 2, discharge is animus towards him as the result of his support for the Union.

[3] *Flowers Baking Co.*, 240 NLRB 870, 871 (1979).

[4] *Washington Nursing Home, Inc*., 321 NLRB 366, 375 (1996).

[5] *W. F. Bolin Co. v. NLRB,* 70 F.3d 863 (6th Cir. 1995).

[6] On the other hand, I reject the General Counsel's argument that Martinez was subjected to disparate treatment because all other employees terminated for tardiness and absenteeism had received progressive discipline first. While some other employees did receive progressive discipline, there is no indication of any warnings or suspensions issued to Jose Humberto Perez Garcia prior to his termination in February 1996.

[7] Respondent also contends that it discharged Welchen Figueroa, Jr. for absenteeism in September 1995. R. Exh. 8, however, indicates that Figueroa worked for Ronin on May 8, 1997. Further, I am unable to conclude on this record that Figueroa was fired for absenteeism and tardiness at any time. Similarly, Ronin's reliance on the discharge of Ricardo Velazquez, a prounion employee, on the same day it fired Martinez, does nothing to advance its affirmative defense.

At trial I rejected Respondent's attempt's to introduce evidence of discharges for absenteeism and tardiness prior to 1995. I did so because prior to the hearing, on Respondent's motion, I modified the General Counsel's subpoena to relieve Ronin from providing the General Counsel with employee time cards prior to 1996. This I believe deprived the General Counsel of an opportunity to prove that other employees with records similar to that of Martinez had not been fired during this time period.

The 8(a)(1) allegations

The General Counsel alleges in the complaint that Ronin violated Section 8(a)(1) from about April 1, through the first week in May, the month or so prior to the election, in the following respects.

1. Interrogations by Supervisor Carlos Velazquez as to the union sympathies and activities of employees.

2. Threats by Velazquez that employees would be discharged if they supported the Union.

3. Threats by Supervisor Raul Rodriquez that employees would be discharged if they supported the Union.

4. Threats by Raul Rodriquez that employees would lose benefits if they chose to be represented by the Union.

5. Threats by Rodriguez that the facility would close if employees chose the Union.

6. Threats by Supervisor Ramon Caraballo of reprisals if employees chose the Union.

7. Other unspecified threats by Carlos Velazquez.

8. Interrogation of Elias Martinez by Carlos Soto about his union membership, activities, and sympathies; and solicitation of employees for antiunion activity.

I conclude there is insufficient evidence to establish any of these allegations. The only evidence supporting these charges is the uncorroborated testimony of Elias Martinez. I find his testimony unpersuasive not only because of his obvious interest in the outcome of this case but also because of the failure of the Union to make any of these allegations when filing objections to the election on May 15. Moreover, I conclude that Martinez was not entirely candid at other points in his testimony. For example, he asserted that he missed work on February 21, 1997, due to foreign particles in his eye. That evening or the evening before he went to work at the port of Ponce unloading the ship "Hispaniola." Therefore, despite the fact that Respondent did not call Velazquez, Rodriguez, and/or Caraballo to controvert Martinez' testimony, I conclude the General Counsel's evidence is not sufficiently persuasive to find the 8(a)(1) violations alleged.

CONCLUSIONS OF LAW

1. By discharging Elias Martinez on June 2, 1997, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. Respondent has not violated the Act as otherwise alleged in the complaint.

The Respondent having discriminatorily discharged Elias Martinez, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]